Supreme Court, U. S.
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80-302

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

EDWARD ANDREW KIMPEL, III,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

1. Is an indigent's right to counsel on appeal fulfilled—and is there compliance with the constitutional mandate of *Anders v. California*, 386 U.S. 738—where appointed appellate counsel simply files an inept brief merely attacking the propriety of the sentence, files no reply brief, and waives oral argument, without either filing an *Anders* brief or raising any issues regarding the sufficiency of the evidence to support the conviction for murder or the fairness of the procedures resulting in conviction?

2. Was petitioner deprived of due process of law at his sentencing hearing, where the trial court considered psychological reports 18 to 21 years old, absent any indication of the qualifications or expertise of their preparers, and despite petitioner's arguments to the sentencing court that the reports were inaccurate and hearsay, that they were too ancient to be relevant, and that they contained privileged material, revelation of which violated his Fifth Amendment privilege against self-incrimination?

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PEOPLE OF THE STATE OF ILLINOIS,

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

Petitioner, Edward Andrew Kimpel, III, respectfully prays that a Writ of Certiorari be issued to the Appellate Court of Illinois, Third District, to review its decision affirming the judgment of the Circuit Court of the Ninth Judicial Circuit, Hancock County, Illinois, adjudging him guilty of murder and imposing a sentence of 40 years.

OPINION BELOW

The opinion of the Appellate Court is reported as *People v. Kimpel*, 78 Ill.App.3d 929, 34 Ill.Dec. 254, 397 N.E.2d 926 (3 Dist. 1979).

JURISDICTIONAL STATEMENT

On December 7, 1979, the Appellate Court of Illinois, Third District, filed its opinion affirming the judgment of the Circuit Court of Hancock County. (App. A) No petition for rehearing was filed. On February 1, 1980, petitioner filed, *pro se*, a timely petition for leave to appeal in the Supreme Court of Illinois. After that Court granted extensions of time within which to file an amended petition until May 17, 1980, petitioner, through present counsel, timely filed an amended petition for leave to appeal. (App. p. 8a) This was denied (No. 52996) by the Supreme Court of Illinois on May 29, 1980. (App. p. 38a) This Petition is filed within the time allowed by an order of this Court entered on July 30, 1980, extending the time within which a petition for certiorari may be filed until August 27, 1980. (No. A-88) Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) and Rule 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in part:

> "No person shall . . . be compelled in any criminal case to be a witness against himself."

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "Section 1. * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

STATEMENT OF THE CASE

Petitioner, while in a highly intoxicated state, visited the deceased in her trailer home for the purpose of continuing to negotiate with her for the sale of the trailer home. During an argument which ensued, he struck and then shot the deceased. (See App. 3a; 12a)

The trial court submitted to the jury instructions on the offenses of murder and involuntary manslaughter, (see App. 15a-21a); the jury found petitioner guilty of murder.

Following a hearing in aggravation and mitigation dealing primarily with petitioner's past history of intoxication and the validity and accuracy of certain psychological reports, prepared some 18 to 21 years earlier at the Patuxent Institute, Maryland, (see pp. 1a-3a, *infra*), the court sentenced petitioner to 40 years. (Tr.S. 134)[1]

The State Appellate Defender appointed on appeal filed a brief merely raising two issues, both attacking only the sentence: (a) admission of certain evidence at the sentencing hearing, and (b) validity of the admonitions at the time of election between the old and new sentencing laws. (App. 27a-37a) Appointed appellate counsel filed no reply brief and waived oral argument. After the Illinois Appellate Court affirmed the sentence—(the conviction had not been attacked)—petitioner obtained other (present) counsel who filed an amended petition for leave to appeal, raising, *inter alia*, the following substantial issues[2] as to the propriety of the conviction:

1. Limitation of proper defense argument denied defendant a fair trial. (App. 11a)
2. Defendant was deprived of a fair trial by the incomplete and misleading jury charge. (App. 14a)
3. Defendant was denied a fair trial when the court erroneously instructed the jury that they could consider the defendant's conviction of an offense as affecting his credibility, where no

[1] "Tr.S." refers to the Transcript of the Sentencing Hearing, and "C" to the Common Law Record.

[2] Appendix 8a-26a contains, verbatim, the arguments on these issues as presented to the Illinois Supreme Court. We include them to demonstrate that viable issues, though present, were not raised in the original appeal. See Point 1, *infra*, pp. 7-11.

proper evidence was offered that the conviction of the defendant was for an offense properly admitted and which may be considered on the issue of credibility. (App. 21a)

4. The trial court erroneously refused either to transfer the cause to another county or postpone the trial, although there was substantial adverse pre-trial publicity. (App. 24a)

Different counsel also demonstrated that petitioner was denied effective assistance of counsel on appeal, asserting in the Amended Petition for Leave to Appeal (App. 8a):

> This court should grant leave to appeal and remand the cause back to the Appellate Court for consideration of the issues herein raised relative to the propriety of the defendant's conviction because court-appointed counsel in the Appellate Court merely filed a brief attacking the sufficiency of the sentence, thereby abandoning all issues concerning the sufficiency of the conviction without advising the court of the propriety of such abandonment.

New counsel also raised—in a more complete and advocate-like manner—prior counsel's issues involving the sentence, *i.e.*:

1. The Appellate Court erroneously held that the trial court could consider in sentencing the defendant psychological reports 18 to 21 years old, absent any indication whatsoever of the qualifications or expertise of the preparer of said reports. (Amended PLA, p. 30)
2. Defendant's election to be sentenced under the "new law" is void, where the trial court failed to advise defendant of various distinct potential sentences under both the new and the old law. (*Id.*, p. 41)

Leave to Appeal was denied. (App. 38a)

RAISING THE FEDERAL QUESTIONS BELOW

The issue concerning ineffective assistance of appellate counsel was first raised in the Amended Petition for Leave to Appeal, App. 8a-11a.

The improprieties at the sentencing hearing were brought to the trial court's attention, as follows:

Prior to the sentencing hearing, the trial court ordered a presentence investigation. (C. 160-89) The investigation included a number of documents to which petitioner objected on grounds they contained inaccurate information, were stale and hearsay, and were released, in violation of privilege, without petitioner's knowledge or consent. (C. 194-96) Among the challenged documents were some psychological evaluations from the Patuxent Institute, Maryland, dating back as far as 22 years. (Tr.S. 9)

The trial judge denied a motion to strike the contested information (Tr.S. 7, 95). The State presented no evidence supportive of the contested information, nor did the trial court make a determination as to its accuracy.

In the original appeal, appointed counsel raised the issue of the trial court's having considered improper information at sentencing, (App. 30a); while only Illinois law was cited, clearly this was a due process attack on the procedure utilized at sentencing. (App. 36a)

The additional issues raised in present counsel's Amended Petition for Leave to Appeal were raised for the first time in that Petition. While certiorari is not sought upon any of these grounds at this juncture, they are included to demonstrate the inadequacy of the appeal attacking only the sentence, as supportive of Point 1 herein.

REASONS FOR GRANTING THE WRIT

1.

An indigent's right to counsel on appeal is not fulfilled—and the spirit, if not the letter, of the law as stated in the constitutional mandate issued by this Court in *Anders v. California,* 386 U.S. 738, is violated—where appointed appellate counsel simply files an inept Brief merely attacking the propriety of the sentence, without either filing an "*Anders*" Brief or raising any issues regarding the sufficiency of the evidence to support the conviction for murder or the fairness of the procedures resulting in conviction.

Appointed appellate counsel "dodged" his responsibility under *Anders v. California,* 386 U.S. 738 (1967), by filing a "throw-away" Brief which did not attack the propriety of the conviction—either as to sufficiency of the evidence or as to fairness of the trial—but, rather, merely challenged the 40-year sentence for murder. (The sentencing issues raised were raised ineptly.[3] Moreover,

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[3] The ineptness of original counsel's Brief is apparent; compare the original argument *re* the trial court's consideration of improper evidence at the sentencing hearing, App. 30a-36a, with present counsel's treatment of the issue, Point 2 of this Petition pp. 12-17, *infra.*

Ineptitude of the Brief actually filed, however, merely adds to the persuasiveness of our argument that petitioner here has *not* received what the Constitution promises in the way of appellate counsel. But even if the issues respecting the sentence *are* adequately raised, we submit this does not satisfy the *Anders* requirement if the Brief does not also attack the validity of the conviction, for there has been no *Anders* determination as to possible issues directed to the conviction.

A man in prison naturally expects his appeal to attack not only the sentence but also the conviction—especially where, as here, that conviction was obtained after a lengthy trial at which many viable issues were raised. See App. 11a-26a.

counsel failed to file a Reply Brief and waived oral argument.[4])

In *Anders*, this Court held that an indigent's constitutional right to effective assistance of counsel on appeal requires that appointed counsel proceed "as an active advocate," *id.* at 744; and if, because of a good-faith belief that all possible issues are frivolous, he cannot, then his motion requesting permission to withdraw must "be accompanied by a brief referring to anything in the record that might arguably support the appeal." *Ibid.*

Your Honors' decision in *Anders*[5] was designed to increase the protection afforded indigent appellants by creating a procedure requiring "the court—not counsel— . . . to decide whether the case is wholly frivolous."

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[4] Counsel's failure to file a Reply Brief and waiver of oral argument, again, are not necessary components of our constitutional argument; however, like the quality of the Brief filed, they are factors which this Court cannot ignore in determining whether the filing of a Brief attacking merely the sentence can properly serve to obviate counsel's requirement to comply with *Anders*.

[While the record is silent whether or not petitioner personally participated in the decision to waive oral argument, we submit it cannot be presumed that he waived this substantial aspect of his right to an appeal. *Cf. People v. Lang*, 113 Cal.Rptr. 9, 520 P.2d 393 (1974) (In Bank).]

[5] While the dissenting Justices, Stewart, Black and Harlan, *id.* at 745, wrote that a court-appointed lawyer would not deem an appeal wholly frivolous if the record presented any arguable issues, they wrote in the context of a State system which permitted appointed counsel on appeal to withdraw upon writing the court a letter to that effect. In their opinion, no attorney would write such a letter if it weren't so; ergo, requiring the writing of an *Anders* brief is superfluous.

But here, there is not even the protection of such a letter, and counsel can—and in the case at bar, did—avoid having to write an *Anders* brief simply by filing a perfunctory brief concerning only the sentence.

Ibid.; see *People v. Wende*, 158 Cal.Rptr. 839, 600 P. 2d 1071 (1979). This purpose is thwarted if appellate counsel—as at bar—merely appeals as to the propriety of the *sentence*, for it leaves to counsel—not the court—the crucial decision whether there are any "meritorious", non-frivolous issues respecting the validity of the *conviction*.

Where the lawyer on appeal merely attacks the sentence, it amounts to a return to pre-*Anders* days, when court-appointed appellate counsel could withdraw simply by filing a motion.[6] There is never, as required by *Anders*, a judicial review of the record permitting the Appellate Court to determine whether any meritorious issues could be raised as to the validity of the conviction.[7]

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[6] Indeed, the procedure at bar is *worse* than the procedure utilized in California which this Court struck down in *Anders*; for there, court-appointed counsel, in order to withdraw from what he believed was a wholly frivolous appeal, so stated by letter to the reviewing court. This procedural safeguard—which prompted Mr. Justice Stewart to write:

> "The quixotic requirement imposed by the Court can be explained, I think, only upon the cynical assumption that an appointed lawyer's professional representation to an appellate court in a 'no-merit' letter is not to be trusted." *Id.* at 746—

is utterly lacking where a brief, though filed, merely attacks the sentence. Incidentally, the dissenters felt it relevant to note, "Certainly there was no suggestion in the present case that the petitioner's counsel was either incompetent or unethical." *Id.* at 747. While we do not impugn the ethics of petitioner's original appellate counsel at bar, we do suggest his incompetence, not only for the quality of the brief he did file, but also for failing to raise any of the substantial issues as to the conviction which could have been raised. See App. 11a-26a.

[7] For examples of State reviewing court cases interpreting *Anders*, ruling in appellant's favor in each instance, see: *People v. Lang*, 113 Cal.Rptr. 9, 520 P.2d 393 (1974) (In Bank); *In*

(Footnote continued on following page)

The *Anders* requirement that the appellate court evaluate the proceedings below is not satisfied by an appeal merely as to the sufficiency of the sentence. An indigent has a right to have counsel, "as an active advocate," attack the conviction as well, or, at the very least, to have a court of review, pursuant to *Anders*, review the record as to the sufficiency of the conviction. This does not occur when appointed counsel on appeal attacks only the sentence.[8]

Since *Anders*, lawyers confronted with their obligation have attempted to circumvent it in various ways. For example,

> "[S]ome lawyers . . . submit in support of the appeal a sketchy brief on a single, obviously meritless issue, rather than to move for permission to withdraw and thus be required to show by citation to authorities why numerous possible issues are frivolous. The former course takes much less time. However, the client is misled into believing that his

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[7] *continued*
re Banks, 93 Cal.Rptr. 591, 482 P.2d 215 (1971) (In Bank); *In re Smith*, 90 Cal.Rptr. 1, 474 P.2d 969 (1970) (In Bank); *State v. Pascucci*, 161 Conn. 382, 288 A.2d 407 (1971); *Wright v. State*. 269 So.2d 17 (Fla. Dist. App. 1972); *State v. McKenney*, 98 Idaho 551, 568 P.2d 1213 (1977); *Commonwealth v. Jones*, 451 Pa. 69, 301 A.2d 811 (1973); *Commonwealth v. Baker*, 429 Pa. 209, 239 A.2d 201 (1968); *Commonwealth v. Anderson*, 224 Pa.Super. 391, 307 A.2d 387 (Super. Ct. 1973).

[8] Exhaustive research uncovered only one case resembling the instant case in terms of an appeal of the sentence only while substantial issues existed with respect to the conviction: *People v. Lang*, *supra* note 7. There, only the appellant's commitment as a mentally disordered sex offender was challenged on appeal. The reviewing court, finding possible meritorious issues going to the validity of the conviction, found denial of effective assistance of counsel. Aside from *Lang*, we found no reported cases of this kind; however, we speculate this is because the issue as framed in this Petition is rarely raised as such, rather than because few appointed attorneys file briefs attacking only the sentence.

> case was subjected to appellate scrutiny, while the lawyer is spared the possible hostility of a client who feels his counsel is giving him less than the most vigorous representation."[9]

Another method of avoiding the *Anders* obligation is for the lawyer—as here—to write a brief[10] merely as to the validity of the sentence, file no reply brief and waive oral argument.[11]

Had appointed counsel been required to file an *Anders*-type brief as to the validity of the conviction, he would have been forced to focus on issues which, upon proper review, would have demonstrated that petitioner was deprived of a fair trial. And therein lies the prejudice. Allowing counsel to get away with filing a brief directed only to the sentencing procedures can only encourage *Anders* violations, thus eroding that very right to counsel *Anders* was designed to preserve.

Certiorari should be granted so that this Court may address itself to this perplexing aspect of the problem of how to deal with enforcing every indigent defendant's right to appeal. Where the brief which is filed goes only to the sentence, we submit that requiring an *Anders*-type brief respecting the conviction may be the only effective available means.

And, upon consideration of the merits of the issues, the cause should be remanded to the State reviewing court with appropriate directions.[12]

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[9] Hermann, *Frivolous Criminal Appeals*, N.Y.U.L.REV. § 701, 712 n.51 (1972).

[10] And an inept one, at that.

[11] *Cf. People v. Lang*, *supra* note 4, and discussion in note 8, *supra*.

[12] If this Court agrees with us on the merits of this issue, an appropriate order might be to remand with directions that the State reviewing court permit a fresh appeal.

2.

Petitioner was deprived of due process of law at his sentencing hearing, where the trial court considered psychological reports 18 to 21 years old, absent any indication of the qualifications or expertise of their preparers, and despite petitioner's arguments to the sentencing court that the reports were inaccurate and hearsay, that they were too ancient to be relevant, and that they contained privileged material.

Petitioner moved to strike six documents contained within the pre-sentence report, including several psychological evaluations from the Patuxent Institute in Maryland,[13] asserting that the statements therein were prepared by persons lacking the requisite qualifications to render an expert opinion and were inaccurate. Additionally, petitioner argued that these documents were inadmissible for any or all of the following reasons: (i) they were hearsay; (ii) they were too old to be relevant; and (iii) they contained material given under privilege and therefore not properly admissible. (Tr.S. 5-8)

By denying the motion to strike the Patuxent evidence while, by way of contrast, excluding from his consideration other evidence objected to by petitioner (general hearsay reports from authorities in Iowa) (Tr.S. 3-4), the trial judge demonstrated his belief in the trust-

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[13] The reports in part state:

"He [defendant] has the capacity for sadistic action. These appear to be both conscious and unconscious and the protocol presents evidence of extreme aggressitivity. [*sic.*] It seems that maintaining distance from others is not a satisfactory method of defending against his sadistic impulses . . . The possibility appears that he will tend to get into progressively greater difficulty with society for crimes which will become progressively more aggressive and dangerous." (C. 181)

worthiness of the Patuxent reports. (Tr.S. 7) In other words, he obviously relied on them in making the sentencing determination; thus the court's refusal to exclude them cannot be deemed "harmless error".

After mentioning the holdings cited by petitioner dictating the exclusion of such evidence, and without any rationale, the Appellate Court concluded: "We are not persuaded that the reports were improperly received." (App. 5a)[14]

Although a trial court's reliance on hearsay in assessing punishment is not improper *per se*, *Williams v. Oklahoma*, 358 U.S. 576 (1959); *Williams v. New York*; 337 U.S. 241 (1949), due process will not permit the presentation of highly prejudicial evidence at sentencing without defendant's being given an adequate opportunity to challenge its reliability. *Cf. Vitek v. Jones*, ... U.S. ....., 63 L.Ed.2d 552 (1980). There, this Court held that in a hearing to contest transfer of a prisoner from a penal institution to a mental institution, there is a due process right to "confront and cross-examine witnesses called by the state, except upon a finding . . . of good cause for not permitting such . . . confrontation, or cross-examination." 63 L.Ed.2d at 566.

So too, as to sentencing, where alleged expert evidence is offered, the sole procedure that can insure that the court will not rely on unreliable information, when reports are submitted by alleged experts, is for the experts to be required to appear and have their opinions tested by cross-examination. *Smith v. Estelle*, 602 F.2d 694 (5 Cir. 1979).

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[14] Since no reason was set forth by the Appellate Court, petitioner cannot discuss the court's rationale, and will therefore proceed to demonstrate why such holding is erroneous.

Here, that right was denied by the admission of 18 to 21 year old reports, asserting an expert opinion on petitioner's mental condition and diagnosing him as a person with "sadistic impulses". Admission of this statement violated petitioner's constitutional right of confrontation and due process.

Additionally, the reports contain material, the use of which at the sentencing hearing violated petitioner's constitutional privilege against self-incrimination. Much of the objected-to material in the reports was based on statements made by petitioner while obtaining medical treatment. These reports clearly qualify as privileged information, the disclosure of which was inappropriate. Moreover, petitioner could not have been forced by the court to disclose this information to a psychiatrist or psychologist for the purpose and use of such information in a sentencing hearing. See *Smith v. Estelle, supra.* Presenting such evidence at a sentencing hearing, after it was obtained from an interview of a defendant for other purposes, violates his Fifth Amendment privilege against self-incrimination. *Ibid.*

Moreover, these reports are too old to have evidentiary value; therefore their admission is error. As prior convictions, after a span of years, lose evidentiary worth as to "credibility",[15] so too, psychological evaluations, absent recent reaffirmation by re-testing, must lose validity after a period of years. Here, the 18 to 21 year old reports are so old that they have no evidentiary worth, and their consideration by the trial court denied petitioner due process.

Because the reliability of the conclusions of the persons who prepared the reports cannot be tested, because

[15] See, *e.g.*, F.R.E. 609(b).

the report is based on information that cannot properly be used against petitioner without violating his Fifth Amendment constitutional rights, and because of the staleness of the reports, the trial court's denial of petitioner's motion to strike was error.

* * *

The Appellate Court erroneously held that any error in admitting such prejudicial material would not require reversal of the sentence because there is no evidence that petitioner was prejudiced thereby. (App. 5a)

The trial court specifically excluded certain evidence objected to by the petitioner and refused to exclude other evidence. (Tr.S. 3-4) He thereby conclusively demonstrated that he believed such evidence was relevant and proper for his consideration. See *United States v. Harris*, 558 F.2d 366 (7 Cir. 1977), where the court held:

> "The vindication of a defendant's right to not be sentenced on the basis of improper factors or erroneous information—a right recognized by the court in Townsend and Tucker[16]—should not depend upon the fortuity of the sentencing judge disclosing, perhaps inadvertently, the factors relied upon in the imposition of sentence. *The fairness of the sentencing process is undermined by reliance upon inaccurate information, not by the sentencing judge stating that he relied upon the material which proves to be inaccurate.*" 558 F.2d at 366.

Nor is there any validity in the court's attempt to assert that the sentence here of 40 years, which requires

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16 *I.e., United States v. Tucker*, 404 U.S. 443 (1972), and *Townsend v. Burke*, 334 U.S. 736 (1948).

at least 20 years of incarceration—even if the petitioner is the most model inmate—would be justified even absent the improper prejudicial material in the reports because of petitioner's extensive record of delinquency and criminal convictions. A review in detail of the petitioner's history[17] demonstrates that although it may be long, it is all for petty offenses, not one of which is a crime of violence or a crime against a person; and it is extremely doubtful whether such records would meet present-day due process standards.

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[17] Petitioner's prior conviction record, as found in the presentence report, is as follows:

> "*1946*, Baltimore, Maryland, at the age of fifteen this defendant was declared delinquent mainly for repeatedly running away from home. This defendant was given one year probation which he violated and, as a result, he was committed to the Maryland Training School for Boys for one year. *1952*, Baltimore, Md., bogus checks, sent to the Maryland House of Corrections for one year; *1955*, paroled from the Maryland House of Corrections; *1955*, New Orleans, La., worthless checks, returned to Baltimore, Md. for parole violation; *1956*, Jessup, Md., three charges for larceny, three years at House of Corrections; *1956*, transferred to Patuxent Institution at Jessup, Md. for evaluation as a defective delinquent; *1956*, Patuxent Institution, forgery and false pretenses, three years suspended sentence; *1957*, committed by Baltimore City Court as a defective delinquent and sentenced to an indeterminate term; *1960*, recommitted as a defective delinquent at a rehearing in Baltimore City criminal court; *1962*, defendant was granted a school release by the Board of Review to attend the University of Maryland, failed to return and was officially declared a violator; *1962*, Brownsville, Texas, speeding, fined $7.00 (under the name of Edward Andrew Kimpel, alias date of birth 7-10-31 and alias place of birth, Deland, Fla.); *1974*, Pikesville, Md., escape, returned to Patuxent Institution; *1975*, granted unconditional release from custody of Patuxent Institution as a defective delinquent; *1976*, Peoria, Il., theft, ten days jail; *1976*, Burlington, Ia., false pretenses, seven years suspended sentence plus an outstanding warrant for parole violation issued on May 4, 1977."

The 40 year sentence, permitting parole only after 20 years incarceration, was caused by the prejudicial allegations in the psychological reports.

The admission of prejudicial "expert opinion", absent ability to confront the expert, denied due process. Certiorari should be allowed to permit this Court to speak to the due process requirements at sentencing hearings.

CONCLUSION

For either or both of the foregoing reasons, certiorari should be allowed.

Respectfully submitted,

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APPENDIX A

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

No. 78-349

December 7, 1979

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee.

v.

EDWARD ANDREW KIMPEL, III,

Defendant-Appellant.

Appeal from the Circuit Court of the Ninth Judicial Circuit, Hancock County.
Honorable U.S. COLLINS, *Judge Presiding.*

MR. JUSTICE STENGEL delivered the opinion of the Court:

Following a jury trial defendant Edward Andrew Kimpel III was found guilty of murder and was sentenced to 40 years imprisonment. The only issues upon appeal pertain to the sentencing hearing.

At the time of sentencing, defendant moved to strike several psychological evaluations which were attached to the presentence report. At the time of his conviction,

defendant was 46 years of age and had been convicted of nine prior offenses beginning in 1946 at age 15. Three of the psychological evaluations in question were prepared by counsellors at Patuxent Institute in Maryland where defendant was incarcerated from 1956 until 1962. These evaluations were dated 1957, 1959, and 1960, and each included a discussion of defendant's psychological problems based upon tests and an interview. Each one concluded that he was capable of violent behavior and that his conduct could be expected to become progressively worse. The trial court denied the motion to strike these reports, as well as some later reports not involved in this appeal, and then permitted defendant to introduce evidence to refute the accuracy of these reports.

Defendant testified at length concerning these evaluations. He denied that he had provided any information which would support the conclusions of the interviewers, and he challenged particular findings as erroneous. For example, he disputed a 1957 finding that his IQ was 114. He reminded the court that his IQ was reported to be over 140 at a pre-trial competency hearing, and then he stated, "I function at a higher level than 114." He also disputed statements that he lacked effective relationships at home, that he suffered from an oedipal complex, and that he was manipulative. He also pointed out the inconsistency between the conclusion that he was potentially violent and the authorization in 1960 allowing him to attend classes at the University of Maryland during the day and to return to Patuxent Institute in the evening. (We note that in 1962 he failed to return and remained at large for 12 years.)

Following defendant's testimony, the motion to strike was renewed and again denied. The State presented no

evidence in aggravation. The trial court then heard evidence in mitigation at which point defendant again testified, explaining in some detail the circumstances surrounding his shooting of Patricia Hull. He stated he is an epileptic and an alcoholic, that he becomes paranoid when he is drunk, that he has been hospitalized nine times for acute alcholism, and that he was in an "alcoholic blackout" at the time of the murder.

At the conclusion of the sentencing hearing the trial court explained that defendant had the right to elect to be sentenced under the sentencing provisions in effect after February 1, 1978, or those in effect prior to that date. The court further explained the provisions of the two statutes and then allowed defendant time to confer with his counsel. After being assured by both defendant and his attorney that defendant fully understood the penalty under each law, the court inquired as to defendant's choice. Defendant elected to be sentenced under the new law, and the court then imposed a maximum sentence of 40 years. In announcing sentence the judge discussed the circumstances of the offense and the seriousness of the injury inflicted, defendant's prior history of delinquency and criminality, and the fact that a greater than minimum sentence would be necessary to deter others from committing the same crime.

On appeal defendant first contends that the trial court erred when it refused to strike the three psychological evaluations dated 1957, 1959, and 1960. In support of his contention defendant cites *People v. Vaughn* (5th Dist. 1978), 56 Ill. App. 3d 700, 371 N.E.2d 1248, where a seven-year-old Tennessee prison report classifying the defendant as a "Sociopath" was held to have been improperly considered at the sentencing hearing. Defendant also relies upon *People v. Crews* (1967), 38 Ill.2d

331, 231 N.E.2d 451, where the trial judge had stated, before announcing a sentence of death, that he had read a juvenile caseworker's report recounting statements attributed to the defendant's 4½-year-old son which described previous mistreatment of the 2-year-old murder victim. The supreme court observed that clearly the trial judge was influenced by the report, and then stated:

> "Plainly, a judge with the solemn responsibility of determining the punishment of the convicted is to be encouraged to hear and consider all available and pertinent information concerning the person and the crime, so as to enable him to impose a punishment which is appropriate. However, before relying on such information the judge must determine its accuracy. [citation], and he must take care to shield his mind from what might be the prejudicial effect of unreliable and other improper evidence. [Citation.] If it is shown that the convicted has been prejudiced by the procedure adopted, or material considered by the trial court in conducting its inquiry prior to the imposition of punishment, the resultant penalty will not be allowed to stand." (38 Ill. 2d at 337-8.)

Defendant argues that here the trial court should have stricken the reports because the only evidence received by the court on the issue of their reliability was defendant's testimony that the reports were inaccurate and that the conclusions were false.

The Unified Code of Corrections provides that, where a defendant is convicted of a felony, a written presentence report of investigation must be presented to and considered by the court unless waived by defendant. (Ill. Rev. Stat. 1977, ch. 38, par. 1005-3-1.) This report is to be considered at the sentencing hearing (par. 1005-4-1 (a)(2)) and must included information concerning defen-

dant's physical and mental history and condition, history of delinquency or criminality, and other matters deemed relevant (par. 1005-3-2(a)). In some cases the sentencing procedure has been challenged on the ground that the State has introduced unsubstantiated evidence indicating other criminal conduct, and in those cases, it has been held that the accuracy and reliability of such evidence must be established and that defendant is entitled to cross-examine persons with first hand knowledge of the supposed criminal activity. (See, *e.g.*, *People v. Kirk* (3rd Dist. 1978), 62 Ill. App. 3d 49, 378 N.E.2d 795.) However, we note that here the disputed reports do not involve evidence of prior crimes.

In the instant case we are not persuaded that the reports were improperly received, but even if the trial court did err in admitting these reports into evidence, such error would not be reversible because there is no reason for concluding that defendant was prejudiced by the disputed material. As was said in *People v. Wilson* (1st Dist. 1973), 11 Ill. App. 3d 693, 696, 297 N.E.2d 277, 279:

> "[T]he mere fact that a trial judge, before imposing sentence, is aware of certain inadmissible facts does not automatically insure a reversal of that sentence. The function of a reviewing court is not to determine whether the record is perfect, but to determine whether defendant had a fair trial. Where it can be said from the record that an error complained of could not reasonably have affected the result of the trial, the judgment of the trial court will be affirmed."

In fact, it has been said that there must be a "definitive indication" that the court considered the improper evidence. (*People v. Gaines* (1st Dist. 1974), 21 Ill. App. 3d 839, 316 N.E.2d 14.) In the case at bar there is no in-

dication that the trial court took into account the psychological evaluations in determining the sentence since the court did not mention them in announcing sentence.

Certainly, there was ample competent evidence in the record to support the 40-year sentence which was imposed. Defendant shot the 20-year-old victim twice in the back of the head, just above the neck. Defendant, who was 46 years of age, had an extensive record of delinquency and criminal convictions dating back to 1946. These were among the factors mentioned by the trial judge in announcing sentence, and we believe the sentence was appropriate under the circumstances.

Defendant also asserts that the trial court erred when explaining the choice between being sentenced under the prior law or the law in effect after February 1, 1978, by failing to inform the defendant of the possibility of parole under the sentencing law in effect prior to February 1, 1978.

The trial judge fully explained the provisions of each sentencing scheme except the matter of parole availability under the old law, and the record establishes that prior to making an election, defendant was granted a five-minute recess to discuss the election with his counsel. We have previously held that when the record establishes that defendant has discussed the alternatives with his counsel, in the absence of a contention of inadequate counsel or an indication that defendant misunderstood the consequences of his decision, the failure of the trial court to explain the range of available sentences is not error. (*People v. Hackett* (3d Dist., Docket No. 78-271, Oct. 23, 1979), ... Ill. App. 3d ....., ... N.E.2d ..... .) The rationale underlying this rule is that the primary responsibility of advising the defen-

dant as to the differences between the sentencing law lies with the defense counsel. (See *People v. Peoples* (3d Dist. 1979), 71 Ill. App. 3d 842, 390 N.E.2d 554.) Similarly, under the circumstances present here, the failure to explain parole availability was not error.

For the reasons stated, the judgment of the Circuit Court of Hancock County is affirmed.

Affirmed.

STOUDER, P.J., and ALLOY, J., concur.

APPENDIX B

AMENDED PETITION FOR LEAVE TO APPEAL

[Filed In The Supreme Court Of Illinois
By Present Counsel For Petitioner.]

1.

Introduction

THIS COURT SHOULD GRANT LEAVE TO APPEAL AND REMAND THE CAUSE BACK TO THE APPELLATE COURT FOR CONSIDERATION OF THE ISSUES HEREIN RAISED RELATIVE TO THE PROPRIETY OF THE DEFENDANT'S CONVICTION BECAUSE COURT-APPOINTED COUNSEL IN THE APPELLATE COURT MERELY FILED A BRIEF ATTACKING THE SUFFICIENCY OF THE SENTENCE, THEREBY ABANDONING ALL ISSUES CONCERNING THE SUFFICIENCY OF THE CONVICTION WITHOUT ADVISING THE COURT OF THE PROPRIETY OF SUCH ABANDONMENT.

Counsel appointed an attorney for an appeal has the right to have that attorney be an advocate. *Anders v. California*, 386 U.S. 738, 18 L.Ed.2d 493. Counsel cannot therefore abandon his client and surrender his client's right to have the propriety of his conviction litigated on appeal merely by moving to withdraw or otherwise taking no action. To insure that this does not occur, the court in *Anders* held:

> "If counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." 386 U.S. 738 at 744.

An indigent's *right* to an appellate brief attacking the sufficiency of his conviction (unless appointed counsel has complied with the rule of *Anders*) cannot be diluted by counsel's merely attacking the sufficiency of appellant's sentence and raising no issue(s) as to the sufficiency of the conviction without filing an *Anders* brief as to the potential errors with regard to the conviction. To permit this to occur negates the entire purpose of the *Anders* rule, in that it prevents a court of review from making a determination that there were no errors in obtaining the conviction. *Cf. People v. Wende*, 158 Cal.Rptr. 839, 600 P.2d 1071.

Here, court-appointed counsel merely raised errors as to the propriety of the sentence. Neither affirmatively as an advocate, nor in the form of an *Anders* brief, did he raise the numerous issues set forth below which are not frivolous issues; some of them rise to the level of plain error.

This court should, then, grant leave to appeal and, under its supervisory power pursuant to the philosophy of *Anders v. California*, resubmit this cause to the Appellate Court, Third District so that defendant can have an adjudication of those issues by the Appellate Court.

As an alternative, this court, upon granting leave to appeal, should consider those issues itself. The court has the power so to do.

Although the general rule is that errors not raised in the Appellate Court will not be considered by the Supreme Court—"This is not a hard and fast rule, and where [the] Court can see that the application of it would result in great injustice, it will not be blindly adhered to." *People v. Donahoe*, 279 Ill. 411, 117 N.E.

105. The rule that errors not raised in the Appellate Court are waived, as the rule that new matters cannot be raised on Petition for Rehearing, states an admonition to the parties, not a limitation upon the jurisdiction of the court. *Hux v. Raben*, 38 Ill.2d 223, 230 N.E.2d 831.

In *Hux*, the court equated the rule governing waiver due to failure to raise a matter in the Appellate Court, to the plain error rule which permits errors not raised in the trial court to be considered on appeal due to the extreme nature of the prejudice. See also *People v. Baltimore*, 7 Ill.App.3d 633, 288 N.E.2d 659; *People v. Murrell*, 60 Ill.2d 287, 326 N.E.2d 762.

Hence, applicable to this court's authority to consider issues here raised for the first time is the court's statement in *People v. Hamby*, 32 Ill.2d 291, 205 N.E.2d 456, 458 (1965):

> "We consider the waiver principle a salutary one, conducive to the effective enforcement of the rules which society has established for its protection, but we have not hesitated to relax its application where fundamental fairness so requires."

Similarly, it has been held "the waiver rule will not be applied to bar review of those issues as to which review by direct appeal has been unconstitutionally denied because of deprivation of the right to effective assistance of counsel on appeal." *People v. Blewett*, 11 Ill.App.3d 1051, 298 N.E.2d 366, 369 (1973), relying on *People v. Frank*, 48 Ill.2d 500, 272 N.E.2d 25 (1971).

Here, no issues were raised on appeal as to the propriety of the conviction and no "*Anders*" brief was filed. Appointed appellate counsel did not choose to file a

reply brief or argue the issues he did raise,[1] and instead moved to waive oral argument. See Appendix B. In truth, he waived defendant's right to appeal by the sham of a brief, thereby avoiding complying with *Anders v. California*. Defendant was deprived of effective appellate counsel.

For the above reasons, the court should either grant leave to appeal and transfer the cause to the Appellate Court to consider issues not there presented, or grant leave to appeal and consider those issues.

2.

LIMITATION OF PROPER DEFENSE ARGUMENT DENIED DEFENDANT A FAIR TRIAL.

Although the trial court has great discretion in regulating final argument, preventing defense counsel from making a proper and necessary argument can so negate defendant's rights, both to counsel and to present his theory of the case, as to deny him a fair trial. *Herring v. New York*, 422 U.S. 593, 45 L.Ed.2d 593; *People v. McMullen*, 300 Ill. 383, 133 N.E. 328; *State v. Dickerson*, ... S.W.2d ....., 27 CRL 2053, Mo. Ct. Appeals. That is what occurred here, when the court prohibited counsel from arguing that defendant had no motive to kill the deceased.

Defense counsel, in arguing that the homicide was due to recklessness on the part of the defendant, attempted to make a proper argument that defendant had no

[1] There was validity to the issues he did raise. See Points 6 and 7 of this Petition. However, he failed to properly present or argue those issues. (See his brief, Appendix C, and compare to Points 6 and 7.) [Note: References to Appendices are to those filed with the Amended PLA, not to those filed with this Petition for Certiorari.]

motivation or reason to kill the deceased. He was prevented from so doing. The following occurred:

"He came in and gave an affirmative defense to you, that he did not intend to kill Patricia Hull, that it was not murder.

True, he believed that he was the cause of her death and there is no doubt about that, but how that occurred, that is for you to decide. Did he intend to kill that woman? That is the issue before you.

Now, we all know that human beings act—some motives in life. I mean, if you go out and find the window of your car has been smashed open, it was probably done by somebody that didn't like you. If you go home and find that somebody plowed up your yard, it was probably somebody that didn't like you and they did it for a reason. Where is any evidence of such a motivation by Mr. Kimpel to kill Patricia Hull?

There is no relationship between him and Mrs. Hull. They don't even know each other except when they met when the trailer was to be sold. None whatsoever. There is no motivation here.

Mr. Corcoran:

Objection. Motivation is not an element necessary for this offense.

Mr. Naylor:

I didn't say it was.

The Court:

Sustained. Proceed.

Mr. Naylor:

Before you can find evidence that Mr. Kimpel intended to kill the girl, you've got to locate and identify the real human life impulses that are behind such motivation, behind such an intention, to formulate the intention.

I'm sorry if I used the word motivation, but that's what it is to me. Why did somebody act? Before you find that somebody acted intentionally, you should be able to find a reason for it.

Mr. Corcoran:

I object to this version. It is restating the same thing.

The Court:

Sustained. Confine your arguments to the evidence and the inferences drawn." (Tr. 1070-1072)

Sustaining the State objection was prejudicial error.

Although the prosecution can obtain a conviction without proof of motive and can under certain circumstances have the jury so instructed (see IPI Criminal 3.04)[2], a defendant clearly has the right to argue that he did not commit an offense in that his acts were reckless and not intentional because he had no reason or motive to commit the offense. Preventing this argument was analogous to the situation requiring reversal in *State v. Dickerson*, ... S.W.2d ....., 27 CRL 2053, Mo. Ct. Appeals. There, the court held that a defense lawyer should have been allowed to argue that the defendant, being so close to the termination of his parole, would not have risked committing an offense and therefore jeopardizing satisfactory termination of his parole. The court found counsel's argument "sensible and credible". The court held that even though the prosecution need not prove motive as an element of the offense, preventing an argument that defendant had no "motive" was error. The court stated:

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[2] "Motive is that which prompts a person to act. The State is not required to prove motive for the commission of the crime charged." IPI 3.04.

It is reversible error to give such instruction where the prosecution has presented evidence of motive. *People v. Manzella*, 56 Ill.2d 187, 306 N.E.2d 16; *People v. Enright*, 256 Ill. 221, 99 N.E.2d 936. Here, it would have been error to give such an instruction because the prosecution, through witness Meyer, offered evidence of alleged motive, *i.e.*, defendant was having an affair with the victim and she was ruining defendant's marriage. (Tr. 868)

> "A twin aspect of this argument was defense counsel's attempt to argue that defendant had no motive to commit the burglary in question. The state argues that motive is not an element of burglary and, therefore, argues that motive was neither relevant or material in the instant case. We disagree. Admittedly, motive is not an element of the crime charged and, thus, there was no need to formally instruct the jury on motive. E.g., State v. Parker, 509 S.W.2d 67, 71 (Mo. 1974). Nonetheless, defendant did take the stand and deny the acts in question. Thus, the question of motive became important and the absence of motive, arguably, shows innocence. State v. Stapleton, 518 S.W.2d 292, 296 (Mo. banc 1975). In such a case, lack of motive is a proper matter for argument before the jury. See State v. Aitken, 144 S.W.2d 499, 503 (Mo. 1912). Thus, the trial court erred in precluding defense counsel from arguing the relevant meaning of defendant's parole status. See State v. Treadway; State v. Ball. 27 CRL 2053, 2054.

The same rationale of *Dickerson* is applicable here. Even though the State need not prove motive, a defendant has a right to argue that he did not intentionally kill deceased as the State *charges*, because he had no motive to do so.

The trial court confused "a difference between an instruction . . . and argument of counsel." *United States v. Mahone*, 537 F.2d 922 at 927.

Here, defendant's argument that the shooting was reckless and due to his intoxicated state because he had no motive to kill deceased, was "sensible and credible" argument. Preventing this argument on the basis that the prosecution need not prove motive was erroneous and deprived defendant of a fair trial.

3.

DEFENDANT WAS DEPRIVED OF A FAIR TRIAL BY THE INCOMPLETE AND MISLEADING JURY CHARGE.

The instructions, as they attempted to define murder and involuntary manslaughter, and advised the jury of the relationship between those two offenses, were erroneous because: (a) no instruction was given defining the offense of murder; (b) the "issues" instruction defining the offense of murder failed to advise the jury that in order to find the defendant guilty of murder, the State would have to prove that defendant's acts were not done recklessly; (c) although the jury was advised of the definition of "recklessness", a necessary element, the jury was not advised of the definition of "intentionally", also an essential element.

Additionally, the court failed to advise the jury that defendant specifically was charged with involuntary manslaughter, merely advising the jury that defendant was charged with murder.

Based on testimony offered by defendant, the trial court found it appropriate to submit to the jury instructions both on the defense of voluntary intoxication and on involuntary manslaughter. However, although the court properly submitted to the jury an instruction defining recklessness,[3] the court neglected to define for the jury the alternative mental state, *i.e.*, "intentionally". As the instruction defining recklessness was drawn from

[3] The instruction reads, "A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that certain circumstances exist or that a result will follow and such disregard constitutes a gross departure from the care which a reasonable person would exercise in the situation." (Tr. 1098)

Chap. 38, Sec. 4-6, a similar instruction should have been given defining intent, as defined by Sec. 4-4 of Chap. 38. Such an instruction was required because, where the jury had to determine whether defendant acted intentionally or recklessly or whether voluntary intoxication prevented the defendant from being able to act intentionally, (Tr. 1098), the term "intentionally" could *not* be left to the jurors' individual opinions because it was being used as a "term of art," a legal term.

At first blush a court might believe that the term "intentional" needs no definition because it is commonly understood by lay persons. The legislative history, however, demonstrates how wrong this first impression is. In defining "intent" in Sec. 4-4 of Chap. 38, the drafters specifically limited the term "intent", rendering it narrower than the commonly used connotation of that term. The Committee Comments, Smith-Hurd, Annotated Statutes, Chap. 38, Sec. 1-1 to 8 at p. 256 reads:

> "The use of the word 'intent' in the 1961 Code is limited to conscious objectives or purposes to accomplish a described result, as distinguished from the 'general intent' which often has been used to describe a presumption of culpability which follows from injury or awareness that certain voluntary acts will, or probably will, have wrongful or unlawful results."

Hence, since the legislative definition of intent is *narrower* in scope than that which a "lay person" might consider applicable, it is absolutely necessary for a jury to be properly instructed on the statutory definition.

In an analogous situation, in *United States v. Krosky*, 418 F.2d 65, the court reversed, holding it was plain error for the trial court not to give an instruction defining "wilfulness", where wilfulness was an essential in-

gredient of the crime charged. Terms like "wilful", and "intentional", although commonly used by lay persons, have particular "legal meanings" that must be conveyed to the jury by proper instructions. Here, failing to define the term intentionally, and thereby permitting the jurors to convict under their own standards of what is an "intentional" act possibly different from the standard defined by statute, deprived defendant of a fair trial.

* * *

The instructions also were erroneous because the "issues" instruction failed to advise the jury that to convict defendant of murder it was necessary for them to find that his actions were not reckless.

The court instructed the jury on the issues of murder as follows:

> "To sustain the charge of murder, the State must prove the following propositions:
>
> First: That the defendant performed the acts which caused the death of Patricia Hull;
>
> Second: That when the defendant did so, he intended to kill Patricia Hull; and,
>
> Third: That the defendant was then capable of acting intentionally.
>
> If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.
>
> If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty." (Tr. 1099-1100)

This instruction is defective because it fails to advise the jury that they cannot convict the defendant of

murder unless they find beyond a reasonable doubt that defendant was *not* acting recklessly. The failure to so advise the jury in the issues instruction is comparable to the situation wherein the court reversed for the failure of the issues instructions to advise the jury that to find the defendant guilty, they must find that he was not acting either in self-defense or with an unreasonable belief that he was acting in self-defense. See *People v. Ortez*, 65 Ill.App.3d 525, 382 N.E.2d 303, 21 Ill.Dec. 939; *People v. Singleton*, 41 Ill.App.3d 665, 354 N.E.2d 464, *People v. Sunquist*, 55 Ill.App.3d 263, 370 N.E.2d 864, 12 Ill.Dec. 953 and IPI Criminal Instruction 27.01. In *People v. Ortez*, 65 Ill.App.3d 525, 382 N.E.2d 303, 21 Ill.Dec. 939, the court reversed because:

> "While the jury was given the instruction on the lawful use of force in defense of person (IPI Criminal, No. 24.06) they were never informed that they were to consider that instruction with respect to the crime of involuntary manslaughter . . . Thus, the jury could reasonably have interpreted Instruction No. 24.06 as relating solely to the offense of murder."

The situation here is analogous. Although instructed as to the definition of recklessness and its application within the offense of involuntary manslaughter, the jury was never advised that the State must prove beyond a reasonable doubt that defendant's acts were not reckless in regard to the definition of the offense of murder. As in *Ortez*, the jury could have believed that the concept of recklessness "related solely to the offense of" manslaughter.

Although the defense of self-defense is an affirmative defense, the defenses here raised—(1) intoxication and (2) that the shooting was reckless—are so similar in nature that the rule requiring an issues instruction to

advise that the State must prove that the defendant did not act in self-defense, also requires the jury be advised that the State must prove that defendant's act was not reckless. Under authority of *People v. Singleton, supra, People v. Ortez, supra,* and *People v. Sunquist, supra,* and also *People v. Wright,* 32 Ill.App.3d 736, 336 N.E.2d 18, *People v. Graves,* 61 Ill.App.3d 732, 378 N.E.2d 293, 18 Ill.Dec. 829, the issues instruction was erroneous.

> *The court erroneously failed to advise the jury that defendant was charged with a lesser included offense of involuntary manslaughter.*

IPI Criminal 2.01 requires the court, in instructing the jury as to the offenses for which the defendant is charged, to "insert all lesser included crimes as to which the jury will receive a form of the verdict." Here, therefore, it was necessary to advise the jury that the crime of involuntary manslaughter is included within the offense of murder. See IPI 2.01 and 27.01 (sample set of instructions). Instead of so advising the jury, the court erroneously merely advised:

> "The defendant is charged with the crime of murder." (Tr. 1097)

This error was prejudicial because here, the prosecutor's argument attempted to persuade the jury to find the defendant guilty of murder and not manslaughter because defendant was only charged with murder. He argued:

> "You will be offered an instruction by reason of the law of the State of Illinois on the issue of involuntary manslaughter. He is charged with murder. It is a horrible thing to think about. He is charged with it because he did it. The evidence shows that. He did not commit involuntary manslaughter." (Tr. 1062)

And again the prosecutor relied upon the offense with which the defendant was charged:

> "We are charging him with murder, not involuntary manslaughter." (Tr. 1091-1092)

These arguments asserted to the jury that in determining what verdict they reach, they should consider the offense with which defendant was originally charged. Such argument of the prosecutor would be meaningless, but for the court's erroneous instruction which also told the jury that the defendant is charged with murder, and thereby, by implication, advised them that he was not also charged with involuntary manslaughter. Jurors are ever mindful of the statement or preferences of the court, *People v. Sprinkle*, 27 Ill.2d 398, 189 N.E.2d 295, particularly when those statements are contained within the instruction given. *Bollenbach v. United States*, 326 U.S. 607, 90 L.Ed. 354. In *United States v. Wolfson*, 573 F.2d 216 (5 Cir. 1978), speaking on jury instructions, the court stated, p. 221:

> "In any event, we look to the words of the trial court, not defense counsel, in determining if jury instructions are adequate. The burden of giving proper instructions is on the Judge. F.R.Crim.P. 30. And it is his words, not the lawyer's, which 'carry an authority bordering on the irrefutable.' Moody v. United States, 5 Cir. 1967, 377 F.2d 175, 179."

In *United States v. Dellinger*, 472 F.2d [340] at 386, the court stated:

> "The influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling."

Here, the jury, in making its choice, had before it the argument of the prosecutor that defendant is only charged with murder, corroborated by the trial court's

"irrefutable" instruction that defendant was only charged with murder.

In rejecting the manslaughter opinion and reaching a verdict of guilty of murder, the jury could have taken into consideration that the court advised them that defendant was charged with murder—without advising them he was also charged with involuntary manslaughter. Due to the erroneous instruction, plain error occurred.

The combined effect of the errors which occurred in instructing the jury negated the possibility of a fair determination, requiring reversal as plain error. *People v. Wright*, 24 Ill.App.3d 523, 321 N.E.2d 52. See *People v. Davis*, 74 Ill.App.2d 450, 321 N.E.2d 63; *Screws v. United States*, 325 U.S. 91, 89 L.Ed. 1495.

4.

DEFENDANT WAS DENIED A FAIR TRIAL WHEN THE COURT ERRONEOUSLY INSTRUCTED THE JURY THAT THEY COULD CONSIDER THE DEFENDANT'S CONVICTION OF AN OFFENSE AS AFFECTING HIS CREDIBILITY, WHERE NO PROPER EVIDENCE WAS OFFERED THAT THE CONVICTION OF THE DEFENDANT WAS FOR AN OFFENSE PROPERLY ADMITTED AND WHICH MAY BE CONSIDERED ON THE ISSUE OF CREDIBILITY.

The court instructed the jury:

> "Evidence of defendant's previous conviction of a crime is to be considered by you only insofar as it may affect his credibility as a witness, and must not be considered by you as evidence of his guilt of the crime with which he is charged." (R. 145, Tr. 1098)[4]

This instruction was erroneous because, although there was evidence that defendant had been convicted of an

[4] The record does not show who tendered this instruction.

offense, there was no evidence before the jury that defendant had been convicted of an offense that could properly be used to affect credibility. Under the decision of *People v. Montgomery*, 47 Ill.2d 510, 268 N.E.2d 695, convictions which affect credibility are infamous crimes and/or or felonies or misdemeanors that demonstrate untrustworthiness. Conviction of other offenses, although possibly admissible for some other purpose, cannot be considered by the jury as affecting defendant's credibility. *Cf. People v. Brown*, 61 Ill.App.3d 180, 377 N.E.2d 1201, 18 Ill.Dec. 565.

"The party seeking to impeach testimony has the responsibility of presenting evidence of an impeaching conviction." *People v. Yost*, ... Ill.2d ....., 399 N.E.2d 1283 at 1285, 35 Ill.Dec. 755. The sole proper method of admitting such testimony is by an authenticated copy of the conviction. *People v. Kallas*, ... Ill.App.3d ....., 389 N.E.2d 1382, 28 Ill.Dec. 9. Here, this was not done. Hence, there was no evidence of an offense before the jury that could be considered for impeachment. Instructing the jury that defendant's credibility could be affected by his conviction of a crime, when no evidence existed as to such conviction, improperly disparaged defendant's credibility and denied him a fair trial.

In *People v. Richards*, ... Ill.App.3d ....., 381 N.E.2d 307, 21 Ill.Dec. 229, the court reversed for similar error. There, defendant was charged with indecent liberties with a child. Admitted was prior contact between defendant and others, not as evidence of prior similar crimes, but evidence showing prior "relationship and familiarity of the parties." 381 N.E.2d at 308. The court, however, gave to the jury IPI Criminal No. 3.14, referring to evidence of other "crimes". The Appellate Court, in reversing, stated:

"Moreover, the use of the term 'crimes' in the instruction was most certainly error since the defendant had not been charged or convicted of any crime.

The function of jury instructions is to convey to the jury the correct principles of law applicable to the evidence submitted, so that the jury may, by the application of proper legal principles, arrive at a correct conclusion according to the law and the evidence. (People v. Gambony (1948), 402 Ill. 74, 83 N.E.2d 321, cert. denied, 337 U.S. 910, 69 S.Ct. 1045, 93 L.Ed. 1722.) Furthermore, it is reversible error to inject into the case, by way of instruction, issues which are not properly before the jury. People v. McCauley (1972), 2 Ill.App.3d 734, 277 N.E.2d 541." 381 N.E.2d 307 at 308.

Here, there was no evidence before the jury that defendant had been convicted of an offense that could affect his credibility. Instructing the jury that there was, is error.

Vital to the defense was defendant's credibility. Instructing the jury that they could consider defendant's conviction as affecting his credibility, when no evidence was presented, resulted in a situation analogous to *People v. Yost, supra.* Here, the jury considered defendant's credibility affected by convictions that could not properly affect his credibility. It makes no difference if the jury considers "stale convictions", as in *Yost*, or convictions not otherwise proper for consideration of credibility.

Here, where the error was due to an improper instruction—and jurors are so affected by the words of the court—the error was most prejudicial, *People v. Richards, supra*; *Bollenbach v. United States*, 326 U.S. 607, 90 L.Ed. 350 (1940), requiring a reversal.

5.

THE TRIAL COURT ERRONEOUSLY REFUSED EITHER TO TRANSFER THE CAUSE TO ANOTHER COUNTY OR POSTPONE THE TRIAL ALTHOUGH THERE WAS SUBSTANTIAL ADVERSE PRE-TRIAL PUBLICITY.

Prior to trial, there was extensive publicity including editorials in the local newspaper complimenting the prosecutor and the sheriff for doing a job well done. (Tr.H. 21-22, March 8, 1978)[5] The extent of the prejudice was evident also from the *voir dire.* A total of 50 jurors were *voir dired.* Of those 9 were excused for cause, the reasons having nothing to do with prejudice, *i.e.*, 2 to care for father, 2 to care for crops, 2 because of previous jury duty, 1 excused for vacation, 1 excused for financial burden and 1 excused who was employed by the State's Attorney. Of the other 41 potential jurors, some 16 were due to prejudice, 2 because of knowing the victim or the victim's family and 14 due to adverse publicity. Hence, more than one-third of the jurors not excused for other reasons were excused for prejudice. Moreover, due to publicity essentially all other jurors had all heard and had knowledge concerning the facts of the case.

Here then a small farming community had been inundated by publicity concerning the accused and his apprehension, including editorials favorable to the prosecution and the sheriff in apprehending the accused. Under such circumstances it was erroneous for the trial court to refuse either to transfer the cause to another com-

---

[5] The editor of the paper, after testifying at the hearing, threatened the defense lawyer, causing him to be "in reasonable apprehension of physical danger." (C. 126-127) See Appendix D. Counsel's *fear,* as it affected his ability to represent defendant is additional reason why the court's denial of a continuance is erroneous.

munity or, in the alternative, delay trial until some of the recent publicity had subsided.

The prosecutor opposed a delay and the court apparently denied a continuance, because to continue the cause would have meant a trial in the summer and "it is very hard to have a jury trial in this courthouse, next to impossible, in the hot months because of lack of air conditioning." (Tr. 27, April 19, 1978)

Admittedly, effective prejudice from newspaper publicity must vary from community to community. However, the courts have become very cognizant that publicity which could be non-prejudicial in a large metropolitan community, is prejudicial in a small farming community. See *People v. Tidewell*, 89 Cal.Rptr. 444, 473 P.2d 748; *Beck v. Washington*, 369 U.S. 541 (1962). In *Beck*, the court distinguished the situation there from *Irvin v. Dowd*, 366 U.S. 717 (1961), on the basis that in *Irvin* the defendant was tried in a small town.

The court's statement in *Tidewell* is most applicable to the situation here.

> "Given the size of the Lassen County . . . the trial judge should have granted a change of venue when he was presented with a showing of pervasive new coverage of prosecution evidence and county-wide hostility toward the defense. The process of jury selection corroborated the defense affidavits, and should have resolved any possible doubts in favor of a venue change.
>
> *Although all of the jurors selected claimed the ability to sit impartially, such a claim is of course not conclusive 'No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its*

father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, "You can't forget what you hear and see."" (Irvin v. Dowd (1961) 366 U.S. 717, 728, 31 S. Ct. 1639, 1645, 6 L.Ed.2d 751.)"

Here, in that this was a small town, and almost all of the prospective jurors had heard concerning the case, it was error not to either transfer the cause to another county or merely delay the trial. Failure to do so was error.

* * * * *

APPENDIX C

* * * * *

BRIEF AND ARGUMENT OF DEFENDANT-APPELLANT

[Filed In The Appellate Court Of Illinois, Third District, By The State Appellate Defender]

NATURE OF THE CASE

Edward Andrew Kimpel, III was indicted for murder. The jury returned a verdict of guilty on May 8, 1978 and the defendant was sentenced to serve a forty-year determinate term of imprisonment. This appeal is from the sentence imposed and the procedure used in sentencing. No issue is raised concerning the sufficiency of the indictment.

ISSUES PRESENTED FOR REVIEW

I. Whether a judge must strike portions of a presentence report which contain unsubstantiated information which is prejudicial to the defendant after the defendant presents evidence refuting the accuracy of such information.

II. Whether due process requires that a trial judge must fully advise a defendant of the possible sentences, including the possibility of parole, under each of two separate sentencing statutes when the defendant has the right to elect sentencing under either statute.

POINTS AND AUTHORITIES

I.

THE TRIAL JUDGE ERRED IN REFUSING TO STRIKE PORTIONS OF THE PRESENTENCE REPORT WHICH CONTAINED UNSUBSTANTIATED INFORMATION PREJUDICIAL TO THE DEFENDANT AFTER THE DEFENDANT PRESENTED EVIDENCE REFUTING SUCH INFORMATION.

People v. Crews, 38 Ill. 2d 331, 231 N.E. 2d 451 (1967);

People v. Kirk, 62 Ill. App. 3d 49, 378 N.E. 2d 795 (3d Dist. 1978);

People v. Vaughn, 56 Ill. App. 3d 700, 371 N.E. 2d 1248 (5th Dist. 1978);

People v. Powell, 27 Ill. App. 3d 834, 327 N.E. 2d 32 (2d Dist. 1975);

Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed. 2d 393 (1977);

People v. Riley, 376 Ill. 364, 33 N.E. 2d 872 (1941);

People v. Gaines, 21 Ill. App. 3d 839, 316 N.E. 2d 14 (1st Dist. 1974);

People v. O'Neil, 18 Ill. 2d 461, 165 N.E. 2d 319 (1960);

American Bar Association, *Standards on Sentencing Alternatives and Procedures*, §4.5(b).

II.

WHERE A DEFENDANT HAS THE RIGHT TO ELECT SENTENCING UNDER ONE OF TWO DIFFERENT STATUTES, DUE PROCESS REQUIRES THAT THE JUDGE FULLY ADVISE THE DEFENDANT ON THE POSSIBLE SENTENCES UNDER EACH, INCLUDING THE POSSIBILITY OF PAROLE.

Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed. 2d 393 (1977);

People v. Crews, 38 Ill. 2d 331, 231 N.E. 2d 451 (1967);

United States ex rel. Collins v. Claudy, 204 F.2d 624 (3d Cir. 1953).

STATEMENT OF FACTS

Edward A. Kimpel, III was indicted for the murder of Patricia Hull. Following a jury trial, he was convicted and sentenced to a forty year prison term. (R.134)*

Prior to the sentencing hearing, the Court requested a presentence investigation. (C.160-189) The investigation included a number of documents to which the defendant objected because they contained inaccurate information, were stale, hearsay in nature and released without the knowledge or consent of the defendant. (C.194-196) Among these were some psychological evaluations from the Patuxent Institute in Maryland dating back as far as twenty-two years. (R.9)

* Record page numbers refer to the transcript of the sentencing hearing.

The trial judge denied a motion to strike the contested information from the presentence investigation (R.7,95) The State presented no evidence in support of the accuracy of the contested information. Nor did the trial judge make a determination as to their accuracy.

The defendant testified and pointed out numerous inaccurate and prejudicial statements in the contested reports.

Since the defendant was convicted of a crime which occurred prior to February 1, 1978, he was given the option of being sentenced under either the old or new sentencing law. In advising the defendant of the possible sentence he might receive under each law, the trial judge informed him that there was no possibility of parole under the new law. (R.107) The judge, however, neglected to explain that early release through parole was possible under the old law. (R.109)

ARGUMENT

I.

THE TRIAL JUDGE ERRED IN REFUSING TO STRIKE PORTIONS OF THE PRESENTENCE REPORT WHICH CONTAINED UNSUBSTANTIATED INFORMATION PREJUDICIAL TO THE DEFENDANT AFTER THE DEFENDANT PRESENTED EVIDENCE REFUTING SUCH INFORMATION.

When the accuracy of information considered in sentencing is materially denied, "it is incumbent upon the court to use care in determining the accuracy of the information." *People v. O'Neil*, 18 Ill. 2d 461, 165 N.E. 2d 319, 322 (1960).

The defendant moved to strike six documents, including several psychological evaluations from the Patuxent Institute in Maryland, from the presentence investigation submitted to the court. The motion alleged that these documents were hearsay, released without the authority of the defendant, and were too old to be relevant and too speculative and specious to be believed. (C.194-196) At the sentencing hearing, the defendant testified extensively as to material inaccuracies contained in the presentence report. The trial judge, nevertheless, refused to strike the disputed portions of the report and apparently relied upon the entire presentence investigation in sentencing the defendant to a maximum forty year prison term. (R.134)

Illinois case law mandates that a judge must determine the accuracy of any information relied upon in fixing punishment.

In *People v. Crews*, 38 Ill. 2d 331, 231 N.E. 2d 451 (1967), the sentencing judge erred in considering the alleged statements of the defendant's 4½ year old son which were related to a Juvenile Division case-worker by the boy's foster mother. The defendant had been convicted of murdering her daughter. The case-worker's report included statements indicating other instances of alleged mistreatment of the daughter by the defendant. The State failed to call the defendant's son, the case-worker, or the foster mother to testify in support of the allegations in the case-worker's report.

In remanding the case for resentencing, the Court summarized Illinois law on the standard which applies to information considered in the sentencing decision.

> "Plainly, a judge with the solemn responsibility of determining the punishment of the convicted is to be encouraged to hear and consider all available

> and pertinent information concerning the person and the crime, so as to enable him to impose a punishment which is appropriate. *However, before relying on such information the judge must determine its accuracy* (cites omitted) *and he must take care to shield his mind from what might be the prejudicial effect of unreliable and other improper evidence.* (Cites omitted) *If it is shown that the convicted has been prejudiced by the procedure adopted, or material considered by the trial court in conducting its inquiry prior to the imposition of punishment, the resultant penalty will not be allowed to stand.* (Cites omitted) *People v. Crews*, 231 N.E. 2d at 454 (emphasis added)

People v. Kirk, 62 Ill. App. 3d 49, 378 N.E. 2d 795 (3d Dist. 1978) also recognized that a judge must determine the accuracy of information used in the sentencing process. In addition, *Kirk* discussed the use of psychological evaluations in sentencing. The Court found error in the use of such reports which contained references to past improper sexual conduct by a rape defendant. It was held improper to use these reports without having them supported by the testimony of the psychiatrists who prepared them or other competent witnesses.

In *People v. Powell*, 27 Ill. App. 3d 834, 327 N.E. 2d 32 (2d Dist. 1975), the Court remanded the case for resentencing because the sentencing judge relied heavily upon an 8½-year-old psychological report. See also *People v. Vaughn*, 56 Ill. App. 3d 700, 371 N.E. 2d 1248, 1252 (5th Dist. 1978) in which the Court described a 7-year-old psychological report as "extremely unreliable and improper evidence" at a sentencing hearing. Besides being seven years old, the report used in *Vaughn* contained no indication of the qualifications of the person who prepared the report or how much time he spent with the individual prisoners.

The case at bar presents numerous similarities with *Kirk*, *Powell* and *Vaughn*.

First, as in *Kirk*, the State failed to produce the authors of the defendant's psychological evaluations. There was no evidence to support the accuracy of the reports at all. To the contrary, the defendant testified as to a large number of material inaccuracies.

Second, as in *Powell* and *Vaughn*, the reports relied upon in the sentencing process were old. One of the defendant's evaluations dates back twenty-two years. Another is twenty years old and a third is nineteen years old. (R.9,34,44)

Third, the defendant testified that these three evaluations were based upon interviews spread over a three-year period which lasted approximately fifteen minutes each. (R.53) One of the examiners was not even a licensed psychologist. (R.9) As in *Vaughn*, this important information going to the accuracy of the evaluations could not be ascertained from the evaluations standing alone.

The psychological reports were highly prejudicial to the defendant. For example, the 1957 evaluation refers to the defendant's alleged "unconscious sadistic impulses", and concludes with the following statement: "The possibility appears good that he will tend to get into progressively greater difficulty with society for crimes which become progressively more aggressive and dangerous." (C.180, R.24, C.181, R.80) The 1959 evaluation speaks of a "crude and possibly violent emotional configuration" and concludes that the defendant "remains potentially capable of violent unpredictable behavior." (C.182, R.20, C.183, R.80) The 1960 evaluation alleges that Kimpel is "capable of violent destructive behavior on slight provocation." (C.184, R.80)

In addition to denying the truth of such allegations, the defendant pointed out that the annual psychological evaluations at the Patuxent Institute were conducted merely as a matter of form to block the yearly requests for release from the inmates. (R.53)

It is no answer to the prejudicial nature of these unsubstantiated reports to assume that the trial judge was not affected by them. The Court in *People v. Riley*, 376 Ill. 364, 33 N.E. 2d 872, 875 (1941) addressed this issue:

> "Obviously the trial judge owes the same duty to the defendant to protect his own mind from the possible prejudicial affect of incompetent evidence that he would owe in protecting a jury from the same contaminating influence."

People v. Gaines, 21 Ill. App. 3d 839, 316 N.E. 2d 14, 21 (1st Dist. 1974) and *People v. Crews*, 38 Ill. 2d 331, 231 N.E. 2d 451, 454 (1967) also recognized that while strict rules of evidence do not apply in sentencing the Court must still "exercise care to assure the accuracy of information considered and shield itself from what might be the prejudicial effect of improper materials."

The United States Supreme Court has declared that sentencing is a critical stage of a criminal proceeding which must satisfy the requirements of due process. *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed. 2d 393 (1977).

Gardner involved a death penalty case in which a portion of the presentence report was kept secret from the defendant. On appeal, the Supreme Court held that when the accuracy of a report is contested the trial judge can avoid delay by disregarding the disputed material. If the disputed material is, however, of critical importance, the Court should invest the time to ascertain the truth of its contents. 51 L.Ed. 2d at 403

The American Bar Association *Standards on Sentencing Alternatives and Procedures* suggest that the truth of disputed matter in a presentence investigation should be resolved by an informal evidentiary hearing where the issue is important to a proper sentence. ABA *Standards*, § 4.5, commentary to part (b).

The judge in the present case explicitly stated that the defendant's history of prior delinquency and criminal activity was an aggravating factor. (R.133) The history to which the judge referred was based upon the information in the presentence investigation. The finding of aggravation was undoubtedly based in part on the unsubstantiated and prejudicial information disputed by the defendant. There is no evidence that the judge disregarded this portion of the presentence report. To the contrary, the judge specifically denied a motion to strike the disputed portions and reiterated the denial even after the defendant testified as to inaccuracies and the State presented no supporting evidence. (R.7,95)

Under these circumstances, it is the duty of the sentencing judge to determine the accuracy of the contested facts or else to strike that portion from the presentence report. Admission of the disputed portions in this case denied the defendant's due process right to a fair sentencing hearing.

As the Court recognized in *People v. Crews*, 38 Ill. 2d 331, 231 N.E. 2d 451 (1967), when it is shown that the convicted has been prejudiced by material considered by the trial court in sentencing, the resultant penalty will not be allowed to stand.

The unsubstantiated material considered at the sentencing hearing in this case was clearly prejudicial to the defendant. Due process requires that he be given a

new sentencing hearing untainted by an unverified and prejudicial presentence report.

II.

WHERE A DEFENDANT HAS THE RIGHT TO ELECT SENTENCING UNDER ONE OF TWO DIFFERENT STATUTES, DUE PROCESS REQUIRES THAT THE JUDGE FULLY ADVISE THE DEFENDANT OF THE POSSIBLE SENTENCES UNDER EACH, INCLUDING THE POSSIBILITY OF PAROLE.

The United States Supreme Court has recognized that the sentencing process as well as the trial itself must satisfy the requirements of the Due Process Clause. *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed. 2d 393 (1977)

The defendant in this case was convicted of a crime which occurred prior to February 1, 1978. As the trial judge correctly observed, the defendant was, therefore, entitled to elect sentencing under either the new law (Ill. Rev. Stat. Ch. 38, §1005-8-1(a)(1)) or the previous sentencing statute. (R.106) The defendant elected the new law and received a maximum forty-year sentence with no possibility of parole. (R.134)

In deciding which sentencing option to choose, it was essential to the defendant for the judge to fully advise him as to the possible sentences under each alternative. The judge failed to do this and thereby violated the defendant's right to due process of law.

The trial judge advised the defendant that there was no possibility of parole under the new law. (R. 107) In advising the defendant of the old law, however, the judge made no reference to parole except to state that a three-year period of mandatory parole is required upon release. (R.109) The judge failed to tell the defendant

that early release via parole is possible under the old law. This omission deprived the defendant of the opportunity to make an informed decision.

Due process requires that "essential fairness" must prevail in sentencing procedures. *United States ex rel. Collins v. Claudy*, 204 F.2d 624 (3d Cir. 1953). It has also been recognized that sentencing is a critical stage in a criminal proceeding. *Gardner v. Florida*, 430 U.S. 349 (1977) It is clear, therefore, that due process requires a judge at a sentencing proceeding to completely inform the defendant of available sentencing alternatives.

Where a defendant is prejudiced by a sentencing procedure, the resultant penalty cannot stand. *People v. Crews*, 38 Ill. 2d 331, 231 N.E. 2d 451 (1967) In this case, the defendant was prejudiced by the judge's failure to inform him that parole was available under the old sentencing law. This failure to fully advise the defendant was in violation of due process and requires that the defendant's sentence be vacated and a new sentencing hearing held.

CONCLUSION

For the reasons stated herein, the defendant requests that this Court vacate his sentence and remand the cause for a new sentencing hearing.

* * * * *

APPENDIX D

UNITED STATES OF AMERICA

STATE OF ILLINOIS
Supreme Court—ss.

* * * * *

BE IT REMEMBERED, that, to-wit: on the 29th day of May, 1980, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

PEOPLE STATE OF ILLINOIS,

Respondent,

No. 52996 *vs.*

EDWARD ANDREW KIMPEL, III,

Petitioner.

Petition for Leave to Appeal from
Appellate Court, Third District,
78-349, 77 CF 22.

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 23rd day of June, 1980.

/s/ CLELL L. WOODS, Clerk,
Supreme Court of the State of Illinois.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDWARD ANDREW KIMPEL, III,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDWARD ANDREW KIMPEL, III,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The Illinois Appellate Court Opinion was correctly cited in petitioner's brief. (Petition at 2)

JURISDICTIONAL STATEMENT

Respondents take exception to any claim that this Court has jurisdiction, at this time, to resolve the first of petitioner's two questions presented for review. The jurisdictional requisites for the second question presented for review are adequate-

ly set forth in the Petition for Writ of Certiorari. (Petition at 2) However, as treated more fully in the argument portion of this Brief in Opposition, respondents do not believe that petitioner has shown any compelling reason for this Court to grant the writ of certiorari, irrespective of whether proper jurisdiction lies.

The first question presented for review by petitioner, that which concerns the conduct of his appellate counsel, fails to conform to the requirement that the judgment appealed from is "final". 28 U.S.C. § 1257 (1979). Before certiorari lies, the state court judgment must be subject to no further review or correction in any other state tribunal. *Market Street R. Co.* v. *Railroad Commission,* 324 U.S. 548, 551 (1945); R. Stern & E. Gressman, Supreme Court Practice (5th ed., 1978) at 173.

Petitioner first questioned his appellate counsel's effectiveness in an amended petition for leave to appeal in the Illinois Supreme Court. (Petition at 2, 4) The Illinois Supreme Court then denied leave to appeal. (Petition at 38a-39a) The Illinois Supreme Court's action is not a decision on the merits and has no *res judicata* effect. Analogous to this Court's denial of a writ of certiorari, the denial of leave to appeal carries no connotation of approval or disapproval of the Illinois appellate court's action. *People* v. *Vance,* 76 Ill.2d 171, 390 N.E.2d 867, 872 (1979). Nevertheless, the Illinois Supreme Court's action has not left petitioner without remedy in the Illinois courts. Issues involving the effectiveness of appellate counsel are cognizable under the Illinois Post-Conviction Act, Ill. Rev. Stat. ch. 38 § 122-1 *et. seq.* (1979). *See, e.g., People* v. *Hesler,* 60 Ill. App. 3d 59, 376 N.E.2d 408 (2d Dist. 1978). *C.f. People* v. *Hamby,* 32 Ill.2d 291, 205 N.E.2d 456 (1965).

Due to the fact that the Illinois Appellate Court judgment is still subject to collateral review in the Illinois courts and that the identical issue raised before this Court may be maintained in that collateral proceeding, it behooves this Court to refrain from exercising jurisdiction over petitioner's first claim.

QUESTIONS PRESENTED FOR REVIEW

1. Whether appointed appellate counsel is constitutionally required to file an *Anders* brief in an appeal where the brief that he submitted raised issues concerning the sentencing hearing but not issues involving the conviction itself and where counsel did not request to withdraw from the case? Whether the quality of counsel's appellate brief and his decisions to waive oral argument and not to file a reply brief constituted ineffective assistance of counsel?

2. Whether petitioner was deprived of due process at his sentencing hearing when the trial court admitted, over a claim of unreliability, certain aged psychological evaluations where the record demonstrates that the court was fully cognizant of the degree of reliability of the information contained in the reports, where the court did not refer to the reports when it stated the factors on which the sentence was based, and where the sentence imposed was amply supported by other evidence?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner has quoted those amendments to the United States Constitution applicable to this case. (Petition at 3)

STATEMENT OF THE CASE

In addition to the argument set out in petitioner's brief (Petition at 3-5) those facts needed for this Court to decide the Petition for Writ of Certiorari can be found within the Illinois Appellate Court's opinion *People* v. *Kimpel,* 78 Ill. App.3d 929, 397 N.E.2d 926 (3rd Dist. 1979). Other facts are set out as needed in the ensuing sections of this brief.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI:

INTRODUCTION

In seeking a writ of certiorari in this cause, petitioner alleges that he was denied his sixth amendment right to effective assistance of counsel in that Theodore Gottfried, the signatory on the appellate brief, filed an "incompetently" prepared brief, filed no reply brief, and waived oral arguments. Petitioner also claims that counsel violated the dictates of *Anders* v. *California*, 386 U.S. 738 (1967), when, in his appellate brief, he did not address any issues relevant to the conviction and only issues pertaining to the sentence imposed on petitioner. In a second issue, petitioner seeks a writ of certiorari to have this court review the material relied on by the trial court at the sentencing hearing.

Respondents believe that it would not be prudent for this Court to grant certiorari because an extension of *Anders* in this case defies both the letter and spirit of that opinion and would not be in the best interest of indigent defendants; the issue of competency of counsel herein revolves around facts peculiar to the case at hand and would not involve issues germane to any future litigants; and the trial court's consideration of the questioned material at the sentencing hearing was proper or, if not, the material was not so inherently unreliable as to undermine the fairness of petitioner's sentencing hearing.

I.

APPELLATE ATTORNEYS OF INDIGENT DEFENDANTS SHOULD NOT BE REQUIRED TO FILE *ANDERS*—TYPE BRIEFS WHEN THEY RAISE ONLY ISSUES PERTAINING TO SENTENCING AND WHEN THEY HAVE NOT BEEN REQUESTED BY THEIR CLIENTS TO RAISE ANY ADDITIONAL ISSUES.

The sixth amendment guarantees a criminal defendant the right to effective assistance of counsel. This Court has con-

sistently interpreted that right to require that an indigent defendant enjoy substantially the same kind of appeal as one who can afford to retain an attorney of his choice. *See, e.g., Douglas* v. *Califo ia,* 372 U.S. 353, 355 (1963); *Griffin* v. *Illinois,* 351 U.S. 12, 19 (1955)

In *Anders* v. *California,* 386 U.S. 738 (1967), this Court held that an indigent defendant is denied his right to counsel when that counsel merely files a letter with the court in which he alleges, in conclusory terms, that the appeal has no merit and that he will file no brief. *Id.* at 744-45. The Court reasoned that counsel has not fulfilled his duty as an advocate for his client when he acts more as an *amicus curiae* than as an advocate. *Id.* at 744. *See also Ellis* v. *United States,* 356 U.S. 674, 675 (1958). The Court then outlined the procedures required of counsel in those instances when he finds his case to be wholly frivolous. In those cases, he must file a brief [hereinafter referred to as an *Anders* brief] referring to anything in the record that might arguably support the appeal. These are the requirements that petitioner contends should have been employed in the instant case.

Respondents submit that such a procedure was not required here. Mr. Gottfried filed a two-issue appellate brief in which he urged that petitioner's sentence be vacated.[1] *Anders* requires no more and petitioner's constitutional protections are no greater.

Notwithstanding petitioner's assertion to the contrary, *Anders* makes no distinction between sentencing issues and issues challenging the conviction. An *Anders* brief is required only when *no* issues are raised *and* counsel seeks to withdraw as advocate for his client. Arguably, an appointed counsel is

[1] Petitioner also asserts that the brief filed by counsel was ineptly drawn. While petitioner concedes that this fact is not critical to his *Anders* claim (Petition at 7, n.3), the competency of counsel will be addressed *infra,* in the next subsection of this brief.

bound to advance in some fashion those issues which his client insists have merit even if counsel disagrees, but that dereliction is not involved here. Because counsel was not endeavoring to withdraw from the case, because counsel did not undermine his role as an advocate, and because petitioner has never asserted that he requested that certain issues be raised that were not, Mr. Gottfried should not be required to have set out those issues that might arguably[2] have been raised but were not.[3]

An extension of *Anders* to require the inclusion of all arguable issues in cases where counsel is not seeking to withdraw as an advocate would result not only in an infusion of meritless cases into the judicial system but also in a differentiation between briefs of appointed and retained counsel that would clearly disfavor indigent defendants. Retained counsel would continue to refrain from inserting marginal issues into an appellate brief, knowing that this practice antagonizes courts and deflects attention from more meritorious contentions. Since the purpose of *Anders* is to place indigent defendants in a similar position to those defendants financially able to retain counsel of their choosing, *c.f. Nickols* v. *Gagnon,* 454 F.2d 467, 471 (7th Cir. 1971) (Stevens, J.), then this result would be adverse to this Court's intentions. Appointed counsel should

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[2] Petitioner sets out four additional arguments that might have been raised. While the merits of those issues are irrelevant to this inquiry, *Suggs* v. *United States,* 391 F.2d 971 (D.C. Cir. 1968), respondents submit that these issues are indeed frivolous and lacking in merit.

[3] Petitioner cites no case law in support of his argument. He claims that exhaustive research uncovered only one case, *People* v. *Lang,* 113 Cal. Rptr. 9, 520 P.2d 393 (1974) (en banc), that presented similar facts. (Petition at 10, fn. 8) However, petitioner overlooked *Martin* v. *Brierley,* 464 F.2d 529 (3d Cir. 1972), where, in a per curiam opinion, the court held that there was no basis in the record for petitioner's contention that counsel failed to follow the procedure prescribed by *Anders.* Counsel obviously did not consider the appeal to be frivolous, the court ruled, since he did not withdraw his appearance but rather pressed the appeal and actually secured relief for the petitioner by way of a credit on his sentence.

not be required to act in a manner inconsistent with a procedure by which retained counsel have been able to serve their clients best.

Petitioner also raises the question that counsel might consciously attempt to avoid the procedures prescribed by *Anders* by filing a brief raising only sentencing issues. Concededly this is a possibility, but so too is the chance that counsel might seek to circumvent *Anders* by raising one or two issues pertaining to the conviction. The answer is not to extend *Anders* in this case, but for courts to insure that only competent and responsible attorneys that are responsive to the needs of their clients are appointed.

Mindful that perfect equality between indigents and nonindigents is impossible to achieve, this Court should not seek, under the guise of extending constitutional rights, to require of an appointed counsel that which would be frowned upon if performed by retained counsel. The writ of certiorari should be denied.

II.

ANY ISSUE CONCERNING THE EFFECTIVENESS OF APPELLATE COUNSEL WOULD BE UNIQUE TO THE FACTS OF THIS CAUSE AND AS SUCH WOULD LACK ANY PRECEDENTIAL SIGNIFICANCE.

While claiming that counsel failed to conform to the prescriptions of *Anders,* petitioner also claims that he was denied effective assistance of counsel due to the allegedly inept quality of Mr. Gottfried's brief and his decisions not to file a reply brief and to waive oral argument.

In turn, respondents submit that counsel's decisions not to file a reply brief and to waive oral argument are customary practices in the legal profession and do not evince a deprivation of an indigent's constitutional rights. As to the quality of petitioner's appellate brief, respondents submit that this issue

merely involves the application of a set of facts to a legal standard, an issue unworthy of this Court's precious time.

Petitioner categorizes the brief filed by Mr. Gottfried as a throw-away brief that enabled counsel to dodge his responsibilities. (Petition at 7) However, in the "inept" brief, as petitioner depicts it (Petition at 7, fn. 3), twelve authorities were cited and issues were raised that even present counsel consider worthy enough to advance to this Court. It is totally inconsistent with logic for present counsel to argue, on the one hand, that Mr. Gottfried avoided his obligations to his client by filing an inept brief and, on the other hand, to seek a writ of certiorari in this Court on issues initially ferreted from the record by Mr. Gottfried and raised by him before the appellate court.

Furthermore, it should be noted that counsel's decisions to waive oral argument and not to file a reply brief are strategy decisions commonly utilized by the criminal bar. The Illinois Appellate Defender's Office, which Mr. Gottfried heads, waives oral arguments in almost half of its cases. The criteria used is whether novel issues have been raised or whether the argument might go beyond the scope of the briefs. Perhaps, a federal habeas corpus action would be a more appropriate remedy for seeking a justification or explanation of Mr. Gottfried's actions in this case.[4] A district court, if it finds any merit to petitioner's contentions, could order an evidentiary hearing and inquire into Mr. Gottfried's entire relationship with his client.

For these reasons, this Court should not grant a writ of certiorari in this cause.

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[4] Of course petitioner must first exhaust any available state court remedies before proceeding in federal court. 28 U.S.C. § 2254(b) & (a). (*See* Jurisdictional Statement, *supra* at 1.)

III.

THE TRIAL JUDGE'S CONSIDERATION, PRIOR TO SENTENCING, OF CERTAIN EIGHTEEN TO TWENTY-ONE YEAR OLD PSYCHOLOGICAL EVALUATIONS ATTACHED TO THE PRE-SENTENCE REPORT WAS PROPER WHERE THE RECORD DEMONSTRATES THAT HE WAS FULLY COGNIZANT OF THE DEGREE OF RELIABILITY AND ACCURACY OF THE INFORMATION CONTAINED IN THE REPORTS, WHERE HE DID NOT REFER TO THE REPORTS WHEN HE STATED THE FACTORS ON WHICH HE BASED HIS SENTENCE, AND WHERE THE SENTENCE IMPOSED WAS AMPLY SUPPORTED BY OTHER EVIDENCE.

Petitioner contends that the trial court erroneously based its sentencing determination on unreliable and "stale" information contained in three psychological evaluations that were appended to the presentence investigation. Respondents contend that the instant record demonstrates that the trial court was fully informed of the degree of reliability and accuracy of the information in the psychological reports when those were introduced at the sentencing hearing. Furthermore, the record does not indicate that the trial court relied on that information contained in the reports. Finally, the abundant aggravating facts of record that were relied on by the trial court support the sentence imposed.

After a jury trial, petitioner was convicted of murdering a pregnant woman. At the commencement of petitioner's sentencing hearing, petitioner's counsel moved that various portions of the presentence investigation report be stricken. The trial court granted the motion in part and denied it in part. (R. 3-4). [All transcript references are to the sentencing hearing]. As to the portion of defendant's motion asking that

the three psychological evaluations be stricken, the trial court ruled as follows:

> . . . Now whether it is true or untrue I think that is the question. Is the truth of the matter that is set forth, not whether it is stale or hearsay but whether it is true or untrue and I think that is the reason why we allow a hearing on the report. Now this report was filed May 19, 1978 in this court and that has given the defendant ample time to review and study it and as the Act says inspect it. Now if these matters are not true, there is no allegation in the motion. They are not true, however I will agree the matters brought up in '57, '59 and '60 are stale but nevertheless there is nothing in this motion saying those matters ever are not true. I will allow a hearing at this time and if defendant wishes to proceed and show to the court that these are untrue then I will entertain that at this moment. (R. 6-7)

Thereafter, petitioner took the stand and testified extensively and exhaustively concerning each allegation contained in the disputed reports, the credentials of the authors of those reports, and the amount of time that each author had spent with him. (R. 9-55)

At the close of petitioner's evidence in mitigation, his attorney moved again to strike the psychological reports from the presentencing investigation. The trial court responded:

> Alright, the ruling of the court has been already announced. I am sure the court can evaluate the reports in connection with the testimony given as to any weight that might be given to them.

(R. 95)

At the close of the sentencing hearing, the trial court specifically found that none of the statutorily enumerated factors in mitigation was present. (R. 132) In aggravation, it found the following statutory factors: that petitioner inflicted serious bodily harm; that petitioner had a history of prior delinquency and criminal activity; and that a long sentence was necessary to

deter others from committing the same crime. (R. 133) The trial court further found that an extended term would not be warranted, since it believed that petitioner's conduct in the instant case did not meet the criteria of heinous and exceptionally brutal conduct. However, since the court concluded petitioner's offense was close to the standard for an extended term, it considered the maximum term of forty years to be appropriate. (R. 134)

The evidence adduced at trial showed that petitioner murdered the victim in cold blood and without provocation by shooting two bullets into the back of her head, just above the neck. (People's Exhibit No. 19, following R. C 205) In addition, the presentence investigation, which showed that petitioner's age was forty-six, included an extensive history of petitioner's record of prior delinquency and criminality. The prior conviction record is contained at footnote 17, page 16 of petitioner's brief.

Nothing in mitigation was shown in the instant record. Based on those facts, the trial court properly exercised its discretion in choosing a sentence of forty years. Since the record contains ample evidence in support of the trial court's judgment, there is no basis for petitioner's contention that the trial court based its sentencing determination on inaccurate and stale information contained in the psychological evaluations.

As the above summary of facts indicates, the trial court was aware of the potential hazards in relying upon the information in the psychological evaluations. In fact, the trial court characterized that evidence as "stale" and "hearsay". Indeed, the trial court heard extensive testimony by petitioner throughout which he disputed virtually every statement contained in the three psychological evaluations. Additionally, petitioner indicated that he had spent a limited amount of time with each examiner and questioned the credentials of at least one of the examiners. After that evidence had been taken, the trial court denied defense counsel's motion to strike the reports and

indicated that it had heard petitioner's evidence and was capable of determining what weight, if any, to give to the reports. In announcing the reasons for its sentencing determination, the trial court did not allude to the reports or any information contained therein.

Absent any indication that the trial court relied on the psychological evaluations or that such a reliance prejudiced petitioner, there is no reason to grant certiorari here and decide whether introduction of the evaluations deprived petitioner of any due process rights.

CONCLUSION

For the foregoing reasons, respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 80-302

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDWARD ANDREW KIMPEL, III,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Third District

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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An indigent's right to counsel on appeal is not fulfilled—and the spirit, if not the letter, of the law as stated in the constitutional mandate issued by this Court in *Anders v. California*, 386 U.S. 738, is violated—where appointed appellate counsel simply files an inept Brief merely attacking the propriety of the sentence, without either filing an "*Anders*" Brief or raising any issues regarding the sufficiency of the evidence to support the conviction for murder or the fairness of the procedures resulting in conviction. 3

2.

Petitioner was deprived of due process of law at his sentencing hearing, where the trial court considered psychological reports 18 to 21 years old, absent any indication of the qualifications or expertise of their preparers, and despite petitioner's arguments to the sentencing court that the reports were inaccurate and hearsay, that they were too ancient to be relevant, and that they contained privileged material. 6

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In The

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTIONAL STATEMENT

While conceding that the jurisdictional prerequisites are adequately set forth in the petition as to the second question,[1] respondent takes the position that as to the first question,[2] this Court lacks certiorari jurisdiction

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[1] *Re* fairness of sentencing hearing.

[2] *Re* appellate counsel's performance.

because there exists, in Illinois, a statutory post-conviction remedy whereby counsel's appellate performance can collaterally be attacked. (R. Br. 1-2)

The mere existence of a means of collateral review, the efficacy of which has judicially been questioned,[3] must not defeat certiorari jurisdiction, particularly where, as here, the State concedes jurisdiction as to the other issue. The *Anders* question—posing, as it does, an issue which should uniformly be answered on a national level and thus should be decided by this Court per its own guidelines—should be decided as speedily as possible.

[3] See *U.S. ex rel. Williams v. Brantley*, 502 F.2d 1383 (7th Cir. 1974).

ARGUMENT

Introduction

Respondent asserts that "an extension of *Anders* in this case defies both the letter and spirit of that opinion and would not be in the best interest of indigent defendants; . . ." (R. Br. 4), and that the competency issue "revolves around facts peculiar to the case at hand and would not involve issues germane to any future litigants; . . . " (R. Br. 4) As to the sentencing issue, the State's position is that "the trial court's consideration of the questioned material at the sentencing hearing was proper or, if not, the material was not so inherently unreliable as to undermine the fairness of petitioner's sentencing hearing." (R. Br. 4) Petitioner will reply seriatim.

1.

An indigent's right to counsel on appeal is not fulfilled—and the spirit, if not the letter, of the law as stated in the constitutional mandate issued by this Court in *Anders v. California*, 386 U.S. 738, is violated—where appointed appellate counsel simply files an inept Brief merely attacking the propriety of the sentence, without either filing an "*Anders*" Brief or raising any issues regarding the sufficiency of the evidence to support the conviction for murder or the fairness of the procedures resulting in conviction.

The State concedes:

> "This Court has consistently interpreted that right [to effective assistance of counsel] to require that an indigent defendant enjoy substantially the same kind of appeal as one who can afford to retain an attorney of his choice." (R. Br. 4-5)

When was the last time you came across an appeal in a murder case where privately retained counsel urged only sentencing issues?

Of course, *Anders* "makes no distinction between sentencing issues and issues challenging the conviction." (R. Br. 5) A court can and does decide only those questions which are in fact before it. There was no conviction-sentencing dichotomy at issue in *Anders*, so, naturally, no such distinction is made therein. What we ask this Court to do is to extend the *Anders* rationale to the instant situation, thereby assuring that no appointed counsel may ever again circumvent his *Anders* obligation merely by writing an appeal attacking only the sentence.

In the "best of all possible worlds,"[4] perhaps, courts could "insure that only competent and responsible attorneys that are responsive to the needs of their clients are appointed." (R. Br. 7) But we are here and now, in a world where this Court has deemed *Anders* necessary. In such a world, the bulk of indigents on appeal are represented by defender offices, not by individual attorneys of the James Stewart type[5] selectively chosen by the courts. And the ratio between manhours available and amount of work which must be accomplished by such an office simply poses too great a temptation to "cut corners" in a manner which does not occur to retained counsel. The only way, we submit, to insure that the indigent defendant and the well-heeled defendant receive comparable representation on appeal, is to hold that *Anders* will not permit what was done at bar.

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[4] From Leonard Bernstein's musical version of Voltaire's *Candide*.

[5] *I.e.*, the country attorney role in the movie version of Agatha Christie's "Witness for the Prosecution."

Respondent suggests that because retained counsel do not clutter their briefs with marginal issues, requiring appointed counsel to include all arguable issues in cases where counsel does not seek to withdraw would operate to the tactical disadvantage of indigent defendants on appeal. (R. Br. 6) That is not the result we request or seek. On the contrary, we urge that where appointed counsel intends to file a brief attacking sentencing procedures only, the Court require that an *Anders*-type letter and Brief be filed as to the arguable issues respecting the conviction. We do not urge, as respondent seems to think, that all such arguable issues actually be included in the Brief to be filed for the reviewing court's consideration. We submit that the procedural aspects can easily be ironed out so that appellate tactics will not perpetuate the schism between the rich and the poor in our courts of law.

Respondent urges on the one hand that the uniqueness of the facts renders the grant of certiorari improvident, (R. 4), while at the same time stating, without reference to any authority or source for the information, that "The Illinois Appellate Defender's Office, which Mr. Gottfried heads, waives oral argument in almost half of its cases."[6] (R. Br. 8) Even if waiver of oral argument and the decision not to file a reply brief may be "strategy decisions commonly utilized by the criminal bar," (R. Br. 8), then the point of reference should be the retained, not the appointed, bar, to enforce the uniformity of representation assured to all litigants.

[6] We hereby challenge respondent's inclusion of this so-called "fact" in its Brief in Opposition, as it goes to a matter outside the record, without any reference to the source of the information. Indeed, attached is counsel's Affidavit (App. A, attached hereto) stating that Mr. Gottfried told him that the asserted facts therein stated are not true, and that he never advised anyone that his office waives argument and chooses not to file a reply brief in almost half its cases.

By referring to wholesale waivers by the appointed bar, respondent points up the non-uniqueness of the case at bar. While we do not have any actual figures on hand, we are willing to wager that many indigent appellants wind up attacking only the sentence, while few rich ones so limit their appeals.[7]

2.

Petitioner was deprived of due process of law at his sentencing hearing, where the trial court considered psychological reports 18 to 21 years old, absent any indication of the qualifications or expertise of their preparers, and despite petitioner's arguments to the sentencing court that the reports were inaccurate and hearsay, that they were too ancient to be relevant, and that they contained privileged material.

Petitioner relies on his petition.

[7] Respondent also suggests that, absent an allegation that petitioner wanted or asked his appointed counsel to raise any issues pertaining to the conviction, no viable issue is presented by counsel's failure so to do. (R. Br. 6) The indigent defendant cannot be expected to "run his own case." Considering the volume of indigent appeals which must be handled by the various appointed defender offices, to impose any such requirement would all but emasculate both *Anders* and the Sixth Amendment, the purposes of which *Anders* was, we believed, meant to effectuate.

CONCLUSION

For the reasons stated in the Petition, as amplified by this Reply, certiorari should be granted.

Respectfully submitted,

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APPENDIX A

AFFIDAVIT

I, Frederick F. Cohn, being first duly sworn, on oath deposes and states:

1. I have been advised by Mr. Gottfried that the facts stated within the government's Brief in Opposition to Petition for Certiorari are not true and that he never advised anyone that his office waives argument and chooses not to file a Reply Brief in almost half of its cases.

/s/ FREDERICK F. COHN

Subscribed and sworn to
before me this 3rd day
of January, 1981.

_____

Notary Public

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